UNITED STATES OF AMERICA

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1912, TERM

NO. 323

THE CITY OF SAULT STE MARIE,
a Municipal Corporation,
ANDREW J. SHORT, Mayor, et al,
Appellants,

vs.

INTERNATIONAL TRANSIT COMPANY,
Appellee.

Appeal from the District Court of the United States for the Western District of Michigan, Northern Division, in Equity

BRIEF FOR APPELLANTS

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SUBJECT INDEX

TABLE OF CASES

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BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This case arises on the right of the City of Sault Ste. Marie, a municipal corporation, of the State of Michigan,

by ordinance, to licensce and regulate ferries on the St. Marys River, from the Michigan shore to the Canadian shore on the opposite side of the river. The St. Marys river, at the City of Sault Ste. Marie, is about one-half of a mile wide, and is a boundary stream between the State of Michigan, one of the United States of America, on the one side, and the Dominion of Canada, on the other.

The State of Michigan was admitted into the Union in the year 1837.

The City of Sault Ste. Marie was organized under a special charter, granted by the legislature of the state, under Act. No. 533 of Local Acts for the year 1887. Among the powers conferred on the city, relative to ferries, under sub-section 14 of section one of Chapter IX, are the following

> "To establish or authorized, license and regulate ferries to and from the city or any place therein, or from one part of the city to another, and to regulate and prescribe from time to time the charges and prices for the transportation of persons and property thereon."

And by Section one of Chapter XV, under the title "Ferries," the following authority is granted to the city:

> "The council may regulate and license ferries from the city or any place or landing therein to the opposite shore, or from one part of the city to another, and may require the payment of such reasonable sum for such license as the council shall deem proper; and may impose such reasonable terms and restrictions in relation to the keeping and management of such ferries, and the time, manner and rates of carriage and transportation of persons and property as may be proper; and provide for the revocation of any such license, and for the punish-

ment, by proper fines and penalties, of the violation of any ordinance prohibiting unlicensed ferries and regulating those established and licensed." (Transcript of Record 15-49.)

In pursuance of the powers conferred by the state legislature the City of Sault Ste. Marie, by Ordinance No. 223 of the city, approved September 26, 1911, provided for licensing and regulating ferries. (Transcript of Record p. 6.)

The ordinance provides that those desiring to operate a ferry from the Michigan shore of St. Marys river to the opposite shore, shall first procure a license therefor from the mayor of the city. It fixes the rate to be charged for the ferriage of persons and for horses and vehicles with custodian or driver, and for baggage, from the Michigan shore to the opposite shore. (Transcript of Record p. 7.)

It provides for the imposition of a penalty for any violation thereof.

The appellee is a corporation of the Dominion of Canada.

One Pocock, operating a ferry boat belonging to the appellee, engaged in the ferriage of persons and property on said river St. Marys from the Michigan shore, without having procured a license so to do as provided in said ordinance, and was proceeded against for violation thereof.

This suit was brought by the appellee in the Circuit (now District) Court of the United States for the Western District of Michigan to restrain the City of Sault Ste. Marie and its officers from enforcing this ordinance on the grounds briefly stated that:

> " 1st. The ordinance is void because it violates the Commerce clause of the Constitution of the United States.

"2nd. That it is in conflict with article one of the Treaty between the United States of America and the United Kingdom of Great Britain as proclaimed May 13, 1910."

The reasonableness of the rates of ferriage, and other provisions of the ordinance are not questioned by the appellee.

The ordinance in fixing the rate of ferriage does not attempt to fix a rate from the Canadian shore to the Michigan shore, but fixes only the rate from the Michigan shore to the opposite shore.

The appellee at the time of the prosecution referred to herein, and at the time of the commencement of this suit, was engaged in the ferriage of persons and property across the St. Marys river at Sault Ste. Marie, Michigan, from the Michigan shore to the opposite shore on the Canadian side of the river, under an exclusive license granted by the Dominion of Canada, for the ferriage of persons and property across the St. Marys river between Sault Ste. Marie, in the Province of Ontario, and Sault Ste. Marie, in the State of Michigan, and in and by which license so granted the rate of ferriage is not only fixed for the carriage of persons and property from the Canadian shore to the Michigan shore, but it also fixes the rate or charge from the Michigan shore to the Canadian shore. (Transcript of Record p. 67.)

It also provides in said Canadian license that:

"The said licensee shall not at any time during the existence of the license, willfully and knowingly infringe any of the Laws or by-laws or of the regulations of the United States of America, or of the State of Michigan, or of the town of Sault Ste. Marie, U. S. A., in reference to ferriage which may

be applicable to the said Ferry or such portion thereof as may be within the jurisdiction of any of them, United States of America, State of Michigan and the town of Sault Ste. Marie, or permit or suffer the same to be infringed by any officer, servant or employe of the said Licensee." (Transcript of Record p. 67-8.)

The ferry boats of the appellee, the "Algoma" and "Bawating," which were engaged in the ferriage of persons and property across the St. Marys river, and running on regular trips, were small steam vessels constructed and equipped especially for the ferry business only, and engaged generally in the ferriage of persons, baggage and property from the City of Sault Ste. Marie, Michigan, to the opposite or Canadian shore of said river, and were not suitable nor authorized to engage in the general passenger or freight business on the Great Lakes. (Transcript of Record p. 12, 49.)

The appellee maintains on the Michigan side of the river its ferry station house, ticket office, waiting room and dock, where persons and their property are received for transportation across to the Canadian side. All fares are collected on the Michigan side at its ticket office before passengers are permitted to go on board the ferry boats. (Transcript of Record p. 13, 49.)

The maintenance and operation of appellee's ferry business is under the direction, control and management of a superintendent residing in Sault Ste. Marie, Michigan. (Transcript of Record p. 13, 49.)

That the appellees ferry dock, station, ticket office and landing is all within the corporate limits of the City of Sault Ste. Marie, Michigan. (Transcript of Record p. 13-14, 49.)

A blue print map at page 64 of the Transcript of

Record shows the location of the ferry dock and ferry office buildings on the Michigan side of the river.

At the trial below some proofs were introduced by the appellee tending to show that on some occasions a small amount of property was carried across the river on appellee's boats, unaccompanied by a custodian or caretaker. The receipts, however, for the ferriage of property unaccompanied by owner or custodian only amount to on an average of one-fifteen hundredth part of the receipts for the ferriage of persons and of property accompanied by the owner or custodian. (Transcript of Record p. 36.)

The City of Sault Ste. Marie, Michigan, borders on the River St. Marys for some three miles, and the territorial limits of the city extend to the national boundary line, which is at this point about mid-stream.

SPECIFICATION OF ERRORS

Has the State of Michigan, through its municipality, the City of Sault Ste. Marie, the power to establish and license ferries on the St. Mary's river, and to fix the rate of ferriage of persons and property from the Michigan shore to the opposite or Canadian side of the river?

Some proofs were introduced at the trial, but most of the facts were stipulated (Transcript of Record 49). The case was argued and submitted, and the court filed a written opinion therein, in which the court in substance held as a matter of law:

> "That the City of Sault Ste. Marie had no power to regulate ferries on the St. Marys River, or exact

a license fee for a ferry license from the appellee."

"That the City of Sault Ste. Marie had no power to establish and fix the rates of ferriage for the transportation of persons and property from the Michigan shore to the opposite shore of the River St. Marys."

(Transcript of Record p. 89. 90.)

And a decree was entered therein, decreeing that the Ordinance of the City of Sault Ste. Marie:

"is contrary to the Constitution of the United States, and void, and restraining the City of Sault Ste. Marie from enforcing said ordinance. (Transcript of Record p. 93.)

Assignment of error, *Nos. one, two, four* and *five*, all relate to the holding and decision of the court, and the decree entered therein, on the question of the ordinanec being in violation of the Commerce clause of the Constitution of the United States, and are more fully stated as follows:

Assignment of error number one (p. 98).

This assignment of error is based on the decision of the court in holding as a matter of law that:

"The State of Michigan through its municipality, the City of Sault Ste. Marie, has no power to establish and regulate ferries on St. Marys River from the Michigan side across to the Canadian side on the opposite shore of the river and to fix the rate of ferriage from the Michigan shore."

(Transcript of Record p. 98.)

Assignmemnt of error number two (p. 98).

This assignment of error is based on the decision of the court holding that the ordinance is:

"In controvention of the Constitution of the

United States, and especially of the foreign commerce clause of Section 8, Article 1, of the Constitution of the United States."

(Transcript of Record p. 98.)

Assignment of error number four (Transcript of Record p. 98).

This assignment of error is based on the court decreeing that the ordinance, so far as appellee is concerned, is:

"Contrary to the Constitution of the United States."

Assignment of error number five (Transcript of Record p. 98).

This assignment of error is based on the decree of the court wherein it restrains the appellant city—

"From enforcing the provisions of said ordinance or any part thereof against said appellee."

(Transcript of Record p. 93.)

The above several assignments of error may be considered under one general proposition, above stated:

Are the provisions of the ordinance contrary to the provisions of the treaty between the United States and Great Britian of May 13, 1910?

At the trial the Treaty between the United States of America and the United Kingdom of Great Britain and Ireland relative to boundary waters between the United States and Canada, proclaimed May 13, 1910, was offered in evidence. This Treaty, by article one, provides that:

"The navigation of all navigable boundary waters shall forever continue free and open for the purpose of commerce to the inhabitants and to the

ships, vessels and boats of both countries equally subject however to any laws and regulations of either country within its territory not inconsistent with such privilege of free navigation, and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries."

The court held that the ordinance was in violation of this provision of the treaty and so decreed.

Assignments of error 3 and 4 relate to the decision of the court on the effect of the treaty, and to the decree entered therein, and are more fully stated as follows:

Assignment of error number three (Transcript of Record p. 98).

This assignment of error is based on the court deciding and holding:

> "That the provisions of said ordinance is in violation of the treaty existing between the United States of America and the United Kingdom of Great Britain and Ireland relative to boundary waters between the United States and Canada made May 13, A. D. 1910. (Transcript of Record, p. 92.)

Assignment of error number four (Transcript of Record p. 99).

This assignment of error is based on the decree of the court wherein it decrees that said ordinance is:

> "Contrary to the treaty (above stated) and void and of no effect." (Transcript of Record p. 93.)

These assignments of error, Nos. 3 and 4, having relation to the treaty between the United States and Great

Britain, may be considered under one general proposition, as above stated.

BRIEF OF POINTS

The ordinance is not invalid as in violation of the commerce clause of the constitution.

A FERRY IS IN RESPECT TO THE LANDING AND NOT ON THE WATER. THE POINT OF DEPARTURE IS THE SEAT, THE BASE, THE HOME OF THE FERRY.

Conway v. Taylor's Executor, 1 Black 603, 66 U. S. 603, 17 L. ed. 191.

Louisville Ferry Co. v. Kentucky, 188 U. S. 385, 394.

Memphis v. Overton, 3 Yerg. (Tenn.) 387, 390.

State v. Faudre, 54 W. Va. 122, 63 L. R. A. 877.

Powers v. Village of Athens, 99 N. Y. 592.

Discussed on page 21 this brief.

FERRIES ARE LOCAL IN THEIR NATURE AND THE REGULATION OF FERRIES IS A MATTER OF LOCAL CONCERN.

Chilvers v. The People, 11 Mich., p. 51.

St. Clair County v. Interstate S. & T. Trans. Co., 192 U. S., 454.

Discussed on page 19 this brief.

IN ALL LOCAL MATTERS STATE STATUTES ARE VALID UNTIL SUPRSEDED BY ACT OF CONGRESS.

Cooley vs. Port Wardens, 12 How. 310.

Mobile vs. Kimball, 102 U. S. 691, 702.
Atlantic & Company vs. Philadelphia, 190 U. S. 160.
Bowman vs. Railroad Co., 125 U. S. 465, 507.
Leisy vs. Hardin, 135 U. S., 100.
Stoughtenburgh vs. Hennick, 129 U. S. 141.
Telegraph Co. vs. Pendleton, 122 U. S. 347.
Ouachita Packet Co. vs. Aiken, 121 U. S. 444.
Robbins vs. Taxing District, 120 U. S. 489.
Wabash Railway vs. Illinois, 118 U. S. 557.
Morgan vs. Louisiana, 118 U. S. 455.
Cardwell vs. Bridge Co., 113 U. S. 205, 210.
Willoughby on the Federal Constitution, Sec. 309.

THE PRIVILEGE OF KEEPING A FERRY OVER BOUNDARY STREAMS WITH THE RIGHT TO TAKE TOLLS FOR PASSENGERS AND PROPERTY IS GRANTABLE BY THE STATE.

Gloucester Ferry Case (1884), 114 U. S. 196, 217.
State vs. Faudre (1903), 54 W. Va. 122.
Ferry Co. vs. Russell (1902), 52 W. Va. 356.
Cross vs. Hopkins (1873), 6. W. Va., 323.
Carroll vs. Campbell (1892), 108 Mo., 550.
State vs. Sickmann (1896), 65 Mo. App. 499.
Tugwell vs. Eagle Pass Ferry Co. (1888), 74 Tex., 480; 13 S. W., 654.
Parsons vs. Hunt (1905), 98 Tex., 420.
Nixon vs. Reid (1896), 8 So. Dak., 507.
Hatten vs. Turnman (1907), 123 Ky., 844.

THE RIGHT TO ESTABLISH AND REGULATE FERRIES OVER BOUNDARY STREAMS IS AMONG THE POWERS RESERVED TO THE STATE.

Gibbons vs. Ogden, U. S. (1824), 9 Wheat. 1.

In re Young Fed. Cas., U. S. (1824), No. 18150.

Memphis Corp. vs. Overton, Tenn. (1832), 11 Tenn. (3 Yerg.), 387.

People vs. Babcock, N. Y. (1834), 11 Wend. 587, over Niagara River.

Jones vs. Fanning, Iowa (1844), 1 Morris (Iowa), 348.

Mills vs. St. Clair Co., Ill. (1845), 7 Ill., 197, 225 (2 Gilman, 235).

Affirmed 49 U. S. 569, 12 L. ed. 1201.

Phillips vs. Town of Bloomington, Iowa (1848), 1 G. Greene, 498.

Mills et al. vs. County of St. Clair, U. S. (1850), 49 U. S. 569, 12 L. ed. 1201.

Fanning vs. Gregoire, U. S. (1853), 57 U. S. 524, 14 L. ed. 1043.

Chosen Freeholders vs. State, N. J. (1853), 24 N. J. Law, 718.

Newport vs. Taylor, Ky. (1856), 16 B. Mon., 699.

Chispella vs. Brown, La. (1859), 14 La. Ann., 185.

Minturn vs. LaRue, U. S. (1860), 64 U. S. 435, L. ed. 574.

Conway vs. Taylor, U. S. (1861), 66 U. S. 603, 17 L. ed. 191.

Chilves vs. People, Mich. (1862), 11 Mich. 43. over Detroit River.

Marshall vs. Grimes, Miss. (1866), 41 Miss., 27.

Burlington & Henderson Co. vs. Davis, Iowa (1878), 48 Iowa, 133.

City of St. Louis vs. Waterloo-Carondelet F. & Ferry Co., Mo. (1883), 14 Mo. App. 216.

Wiggins Ferry Co. vs. East St. Louis, U. S. (1883), 107 U. S. 365, 27 L. ed. 419.

Tugwell vs. Eagle Pass Ferry Co., Tex. (1888), 9 S. W. 120, 13 S. W. 654.

On the Rio Grande.

Madison vs. Abbott, Ind. (1889), 118 Ind. 337, 21 N. E. 28.

Carroll vs. Campbell, Mo. (1892), 108 Mo. 550.

State vs. Sickmann, Mo. (1896), 65 Mo. App. 499.

Nixon vs. ~~Price~~ Reid, S. D. (1896), 67 N. W. 57, 32 L. R. A. 315.

Sisterville Ferry Co. vs. Russell, W. Va. (1903), 52 W. Va. 356, 59 L. R. A. 513.

State vs. Faudre, W. Va. (1903) 54 W. Va. 122, 63 L. R. A. 877.

N. Y. C. & H. R. R. C. vs. Freeholders, N. J. (1909), 74 Atl. 954.

Port Richmond & Bergen Pt. Ferry Co. vs. Freeholders, N. J. (1910), 77 Atl. 1046.

Discussed on page 21 this brief.

THE RIGHT OF THE STATE TO ESTABLISH AND REGULATE FERRIES OVER BOUNDARY STREAMS BETWEEN STATES AND FOREIGN COUNTRIES HAS BEEN SUSTAINED.

New York (1834), People vs. Babcock, 11 Wend., 587.

Over Niagara River.

Michigan (1862), Chilves vs. People, 11 Mich. 43. Over Detroit River.

Texas (1888), Tugwell vs. Eagle Pass Ferry Co., 9 S. W. 120, s. c. 13 S. W. 654.

Discussed on page 41 this brief.

THIS COURT HAS REPEATEDLY HELD THAT THE POWER OVER FERRIES ON BOUNDARY STREAMS WAS RESERVED TO THE STATES.

(1824) Gibson vs. Ogden (U. S.) 9 Wheat. 1.
(1824) In re Young Fed Cas. No. 18150.
(1850) Mills et al. vs. County of St. Clair, 49 U. S. 569, 12 L. ed. 1201.
(1853) Fanning vs. Gregoire, 57 U. S. 524, 14 L. ed. 1043.
(1860) Minturn vs. La Rue, 64 U. S. 435; 16 L. ed. 574.
(1861) Conway vs. Taylor, 66 U. S. 603,. 17 ed. 191.
(1883) Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, 27 L. ed. 419.

Discussed on page 22 this brief.

FERRIES ARE IN AID OF COMMERCE AND NOT AN INTERFERENCE WITH COMMERCE.

Gibbons vs. Ogden, 9 Wheat. 1 (page 235), 6 L. ed. at p. 79.
Fanning vs. Gregoire, 16 How. 524, 57 U. S.; 14 L. ed. 1043.
Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365; 27 L. ed. 419, 424.

Discussed on page 23 this brief.

WHERE A DOUBT ARISES AS TO THE RESTRICTION OF THE COMMERCE CLAUSE, IT IS TO BE DECIDED IN FAVOR OF THE STATE.

Bank vs. Tennessee, 104 U. S. 495, 26 L. ed. 811.
R. R. Co. vs. Comrs., 103 U. S. 1, 26 L. ed. 359.
Wilson vs. Gains, 103 U. S 417, 26 L. ed. 401.

R. R. Co. vs. Hamblen Co., 102 U. S. 273, 26 L. ed. 152.

R. R. Co. vs. Gains, 97 U. S. 697, 24 L. ed. 1091.

Ferry Co. vs. East St. Louis, 102 Ill. 570.

See Ferry Co. vs. East St. Louis, 107 U. S. 365., 27 Law ed. 422, where the above cases are reviewed and approved with respect to the right of the state to impose a license tax on a ferry.

If the reserved power in the states to regulate ferries over boundary streams is divisable into those that are exclusive in the state, and those that are merely reserved to the states until congress acts, and if the case at bar falls within the latter class, then the power to regulate ferries on the St. Marys River is still in the State of Michigan, as congress has not by any act of congress deprived the state of this power.

Conway vs. Taylor, 1 Black 603; 66 U. S. 17 L. Ed. 191.

The power of the states over the general subject of commerce, according to some of the adjudications, is divisible into three classes:

First. Those in which the power of the state is exclusive.

Second. Those in which the state may act in the absence of legislation by congress.

Third. Those in which the action of congress is exclusive and the state cannot interfere at all.

Covington & C. Bridge Co. vs. Commonwealth, 154 U. S. 204.

THE ACTS OF CONGRESS RELATIVE TO THE

LICENSING AND ENROLLMENT OF VESSELS DO NOT INTERFERE WITH THE REGULATION OF FERRIES BY THE STATES.

Conway vs. aylor, 1 Black, 603; 66 U. S. 17 L. Ed. 191.

Wiggins Ferry Co. vs. East St. Louis, 107, U. S. 365, 27 L. ed. 419.

The Nassau, 182 Fed. 696; Affirmed in part, 110 C. C. A. 184.

Discussed on page 37 this brief.

THE FACT THAT SOME ARTICLES OF FREIGHT ARE ALSO CARRIED ON THE FERRY BOAT DOES NOT CHANGE OR EFFECT THE RULE APPLIED TO FERRIES.

St. Clair County vs. Interstate S. & C. T. Co., 192 U. S., 48 L. ed. 518, 524-525, 458-468.

Sec. 2972 U. S. Revised Statutes, 1878.

Discussed on page 41 this brief.

A LICENSE FEE IMPOSED AS A CONDITION OF GRANTING A FERRY LICENSE IS NOT A TAX ON COMMERCE WITHIN THE MEANING OF THE COMMERCE CLAUSE OF THE CONSTITUTION.

Wiggins Ferry Co. vs. East St. Louis, 102 Ill. 560, 107 U. S. 365, 27 L. ed. 419

Chilvers vs. People, 11 Mich. 43.

Ash vs. The People, 11 Mich. 347.

Kitson vs. Mayor, etc., of Ann Arbor, 26 Mich. 324.

McQuillin Mun. Ord. Co., Sec. 409.

Discussed on page 43 this brief.

THE POWER OF THE STATE TO LICENSE AND REGULATE FERRIES INCLUDES THE POWER TO

FIX RATES FOR THE FERRIAGE OF PERSONS AND PROPERTY.

Fanning vs. Gregoire, 16 How., 524; 14 L. ed. 1043.

Chosen Freeholders vs. State, 24 N. J. Law, 718.

State vs. Sickmann, 65 Mo., App. 499.

Discussed on p. 43

THE FACT THAT DEFENDANT IN ERROR IS A FOREIGN CORPORATION DOES NOT EFFECT THE RIGHT OF THE STATE TO REGULATE FERRIES.

Port Richmon & Bergen Point Ferry Co. vs. Board of Chosen Freeholders, Supreme Court of N. J., 1910, 77 Atl. 1046.

Discussed on page 44 this brief.

TREATY

The ordinance of the City of Sault Ste. Marie regulating ferries on St. Mary's River does not violate the treaty between Great Britian and the United States.

THE ORDINANCE DOES NOT INTERFERE WITH THE PROVISIONS OF THE TREATY THAT "NAVIGABLE BOUNDARY WATERS SHALL FOREVER CONTINUE FREE AND OPEN FOR THE PURPOSE OF COMMERCE TO INHABITANTS AND TO SHIPS, VESSELS AND BOATS OF BOTH COUNTRIES EQUALLY."

Fanning vs. Gregoire, 16 How. 524, (57 U. S. 14 L. ed. 1043, 1047 close of case).

Conway vs. Taylor, 1 Black, 603, (66 U. S. 17 L. ed. 191, 205).

Escanaba, etc., Trans. Co. vs. Chicago, 107 U. S. 678, 27 L. ed. 442, 447.

Discussed on page 45 this brief.

BRIEF OF ARGUMENT.

HAS THE STATE OF MICHIGAN THROUGH ITS MUNICIPALITY, THE CITY OF SAULT STE. MARIE, THE POWER TO ESTABLISH AND LICENSE FERREIS ON ST. MARYS RIVER AND TO FIX THE RATE OF FERRIAGE OF PERSONS AND PROPERTY FROM THE MICHIGAN SHORE TO THE OPPOSITE OR CANADIAN SIDE OF THE RIVER?

It must be conceded that, before the adoption of the Commerce clause of the Constitution of the United States, the power of the states over ferries on boundary waters existed. But it is claimed by the appellee that the power to establish and regulate ferries on boundary waters, at least, was surrendered by the states upon the adoption of the Constitution of the United States, and has ever since rested exclusively in congress.

The Commerce clause of the Constitution of the United States is set forth in the following language:

> *"Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes."*

Therefore, the precise question here presented is whether by this clause of the Constitution the power of the states theretofore exercised to establish and regulate ferries on boundary waters, has been wholly divested from

the states, and placed exclusively in congress, or whether that power was still reserved to the states, or at least reserved to the states until congress should divest it by appropriate legislation.

Nature of Ferries.

In order to fully comprehend the effect of this clause of the Constitution, and whether by its adoption it was intended to reserve to the state the power to establish and regulate ferries, or to wholly deprive the states of this power, it may be necessary to consider to some extent the nature of a ferry and the extent of the ferry business throughout the states.

Ferries Are Local.

That a ferry is local in its nature must be conceded. The very nature of the business makes it local:

> "Carrying persons and property from a point on the shore of a stream or small body of water to a point on the opposite shore."

It effects no other locality. Separate and different ferries may operate across the same stream but a short distance apart, and be wholly independent of each other. The business of ferrying affords an opportunity for persons of all kinds to engage in it. All kinds of crafts from a bark canoe to a steamboat may be used. Different rates of fare may be exacted, as the unscrupulous ferryman may be able to prey on the necessity of unwary travelers. Persons wholly unreliable, and crafts wholly unsafe for passage, may be engaged in it. It is not uncommon to find numerous eager ferrymen soliciting travelers for passage, likened only to the zealous solicitations of hack drivers at railroad depots. The un-

acquainted traveler has no protection for his safety unless ferries are regulated in some way. Serious loss of life is not an uncommon occurrence, owing to the use of unseaworthy crafts for ferries, or through the acts of unskilled or unreliable ferrymen. As the trend of settlement of the United States went westward, ferries were operated without any specific regulation, and in many cases continued without regulation long after the locality had been well settled, and usually until the occurrence of some great disaster, owing to the use of unseaworthy boats, or through the acts of some irresponsible and unscrupulous ferrymen, which resulted in the loss of life, and aroused by public indignation the municipal authorities by ordinance or otherwise adopted means to regulate ferries.

Upon examination of the map of the United States we find that, outside of half a dozen states in the vicinity of the State of Utah, nearly every state in the Union is bounded more or less by streams. It would be difficult to state the exact number of miles of streams that constitute the boundaries on all of the states of the Union. It would run into the thousands of miles. We can in a measure get some idea of the extent of the ferry business that might be carried on when we consider that independent ferries may be established but a short distance apart.

The conditions under which one ferry is operated may be, and generally is, wholly different to that of any other ferry. They may all require different regulations, and different rates of ferriage. All to be regulated according to the necessities of the particular location of the ferry. Ferries therefore are local in their nature. They have been regarded as local by the legislatures of nearly every state in the Union. They have been regarded of such a local nature that state legislatures have provided for their regulation by local bodies and municipalities.

Local bodies and municipalities are familiar with conditions, know what regulations are necessary and are right at hand to enforce them without delay.

Ferries Are of the Landing.

This court long ago held that a ferry was in respect to the landing and not of the water.

Conway vs. Taylor, 66 U. S. 603.

The point of departure is the *seat*, the *base*, the *home* of the ferry.

State vs. Faudre, 54 W. Va., 122.

Power to Regulate Reserved to the States.

Having in mind the local nature of ferries, can it be possible that it was intended by the Commerce clause of the Constitution to give to Congress the exclusive power of regulating this matter, so local in its nature, so stupendous in its number, and so varied in its requirements? Can it be that in adopting the Constitution our forefathers intended to divest the state wholly of this power? That they did not so understand is evident from the subsequent acts of the legislatures of the different states. Each state continued to regulate ferries as before. Judges of the highest state courts regarded that power as reserved to the state, and this court so regarded it.

While it is true the Commerce clause of the Constitution was intended to harmonize interstate and foreign commerce, yet nowhere can it be pointed out that the regulation of ferries on interstate streams, or streams dividing the United States from foreign countries, was considered when adopting the Constitution as a commercial intercourse requiring regulation by congress.

Attorneys may elaborate on the reasons for adopting this clause of the Constitution, and argue that international and foreign commerce must be free and cite judicial decisions of a general nature on this clause of the Constitution; but in determining whether this clause of the Constitution includes ferries we must construe it, having in mind the nature of ferries, and not lose sight of the distinction between the character and nature of ferries when compared with railroads and other interstate or international carriers, and other institutions of interstate and of international character.

At the time of the adoption of the Constitution, and during its discussion, nowhere do we find any argument or reference to ferries as a "crying need" for congressional control, and yet numerous ferries, both interstate and across national boundary streams, had existed for a long time prior to the adoption of the Constitution.

The first definite expression we find from any of the three branches of our Federal Government comes from the judicial branch. In Gibbons vs. Ogden, 9 Wheat. 1; 22 U. S. 1, decided in 1824. The decision in this case is an important one on this subject. The highest courts of the states have ever since followed it in ferry cases, and this court for many years construed Gibbons vs. Ogden as holding that the power to regulate ferries was among the powers reserved to the states.

In the argument before the court in Gibbons vs. Ogden, Mr. Emmett contended that the right to establish and regulate ferries over boundary streams was among the powers reserved to the states, citing numerous acts of the state legislature of New York and other states, and contended that the act under discussion was of a similar nature and governed by the same rule (p. 97). Mr.

Webster conceded that the power to regulate ferries over boundary streams was reserved to the states, but contended that the act in question was ont governed by the rules applicable to ferries (p. 19). Chief Justice Marshall, in delivering his opinion, held (p. 203) that "the power to regulate ferries was reserved to the states." Mr. Justice Johnson, in the same case, in his opinion stated:

> "As to laws effecting *ferries*, turnpike roads and other subjects of the same class, so far from meriting the epithet of 'commercial regulations,' they are in fact commercial facilities." (9 Wheat., 235.)

In 1853 in *Fanning vs. Gregoire*, 16 *How.* 534, 57 *U S.* 14, *L. ed. at page* 1047, the court said:

> "The argument that the free navigation of the Mississippi river, guaranteed by the Ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with the police power of the States in granting ferry licenses."

In 1862, in *Conway vs. Taylor*, 66 *U. S.* 603, 17 *L. ed.* 191, this court at the close of the case said:

> There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any Act of Congress which involves the exercise of this power.
>
> That the authority lies within the scope of "that immense mass" of undelegated powers which "are

reserved to the States respectively," we think too clear to admit of doubt.

We place our judgment wholly *upon that ground.*

In 1883, in *Wiggins Ferry Co. vs. East St. Louis,* 107 U. S. 365; 27 L. ed. 419, this court quoted with approval the case of *Conway vs. Taylor,* holding that:

> "The power to establish and regulate ferries did not belong to congress under the power to regulate commerce, but belonged to the states, and lay within the scope of that immense mass of undelegated powers reserved by the Constitution to the states."

That the power to establish and regulate ferries on boundary streams was reserved to the States has been determined by a long line of decisions both in the highest courts of the States, as well as by this court.

Gibbons vs. Ogden, U. S. (1824), 9 Wheat, 1.
Wheat. 1.

In re Young Fed. Cas., U. S. (1824), No. 18150.

Memphis Corp. vs. Overton, Tenn. (1832), 11 Tenn. (3 Yerg), 387.

People vs. Babcock, N. Y. (1834), 11 Wend. 587.
Over Niagara River.

Jones vs. Fanning, Iowa (1844), 1 Morris (Iowa), 348.

Mills vs. St. Clair Co., Ill. (1845), 7 Ill., 197.
Affirmed, 49 U. S. 569, 12 L. ed. 1201.

Phillips vs. Town of Bloomington, Iowa (1848), 1 G. Greene, 498.

Mills et al. vs. County of St. Clair, U. S. (1850), 49 U. S. 569, 12 L. ed. 1201.

Fanning vs. Gregoire, U. S. (1853), 57 U. S. 524, 14 L. ed., 1043.

Chosen Freeholders vs. State, N. J. (1853), 24N. J. Law, 718.

Newport vs. Taylor, Ky. (1856), 16 B. Mon., 699.

Chispella vs. Brown, La. (1859), 14 La. Ann., 185.

Minturn vs. LaRue, U. S. (1860), 64 U. S. 435, 16 L. ed. 574.

Conway vs. Taylor, U. S. (1861), 66 U. S. 603, 12 L. ed. 191.

Chilves vs. People, Mich. (1862), 11 Mich. 43. Over Detroit River.

Marshall vs. Grimes, Miss. (1866), 41 Miss., 27.

Burlington & Henderson Co. vs. Davis, Iowa (1878), 48 Iowa, 133.

City of St. Louis vs. Waterloo-Carondelet F. & Ferry Co., Mo. (1883), 14 Mo. App. 216.

Wiggins Ferry Co. vs. East St. Louis, U. S. (1883), 107 U. S. 365, 27 L. ed. 419.

Tugwell vs. Eagle Pass Ferry Co., Tex. (1888), 9 S. W. 120, 13 S. W. 654.
On the Rio Grande.

Madison vs. Abbott, Ind. (1889), 118 Ind. 337, 21 N. E. 28.

Carroll vs. Campbell, Mo. (1892), 108 Mo. 550.

State vs. Sickmann, Mo. (1896), 65 Mo. App. 499.

Nixon vs. ~~Price~~ Reed, S. D. (1896), 67 N. W. 57, 32 L. R. A. 315.

Sisterville Ferry Co. vs. Russell, W. Va.

(1903), 52 W. Va. 356, 59 L. R. A. 513.

State vs. Faudre, W. Va. (1903) 54 W. Va. 122, 63 L. R. A. 877.

N. Y. C. & H. R. R. C. vs. Freeholders, N. J. (1909), 74 Atl. 954.

Port Richmond & Bergen Pt. Ferry Co. vs. Freeholders, N. J. (1910), 77 Atl. 1046.

All of the foregoing authorities hold that the power to regulate ferries on boundary streams is reserved to the states, and while the term "exclusive" is not used, the language used is sufficiently strong to warrant that conclusion.

But it is claimed that the case of *Gloucester Ferry Co. vs. Commonwealth of Pa.*, 144 *U. S.* 196, modified the former decisions of this court to at least holding that the right to regulate ferries over boundary streams was not exclusive in the states, but reserved merely until congress should divest the power of the States by congressional legislation. And that later, in the case of *Covington Bridge Co. vs. Kentucky*, 154 U. S. 204, the prior decisions of this court were still further modified to the extent of changing the previous adjudication of an exclusive power in the states over ferries into an exclusive right in congress.

Gloucester Ferry Case, Decided 1884.

The *Gloucester Ferry* case arose over an attempt of the State of Pennsylvania to tax the stock of the ferry company, which was a corporation of New Jersey, and paying tax in New Jersey. It was held that ferry boats were a means of commerce and that the tax would be an

additional burden and in violation of the commerce clause of the Constitution.

The court in discussing ferries said:

> "The privilege of keeping a ferry with a right to take tolls for passengers and freight is a franchise grantable by the states."

But further said:

> "Ferries between one of the states and a foreign country cannot be deemed beyond the control of congress under the commercial power. They are necessarily governed by its legislation on the importation and exportation of merchandise and the immigration of foreigners—that is, all subject to its regulation in that respect and if they are not beyond the control of the commercial power of congress, neither are ferries over waters separating states."

But the court, referring to taxation of ferries, further said:

> "Freedom from such impositions does not, of course, imply exemption from reasonable charges as compensation for the carriage of persons in the way of *tolls* or *fares*."

It will be observed that the court is not dealing with the question of the power of the state to *regulate ferries*. Nor were any of the ferry cases previously determined by this court discussed or referred to in the *Gloucester case*.

In the case of *Tugwell vs. Eagle Pass Ferry Co.* (Texas), Vol. 9, S. W. 120, decided in 1888, which was a ferry case arising over a ferry on the Rio Grande between Texas and Mexico, on rehearing (13 S. W. 654) it was urged that the case of *Gloucester Ferry Co. vs. Commonwealth of Pa.* over-ruled the case of *Conway vs. Taylor*,

and it was argued on rehearing that the case fell squarely within the commerce clause of the Constitution, but the court, after careful consideration of the *Gloucester Ferry Co.* case, said:

> "Having again carefully examined the opinions in the two cases, we find no ground for this assumption. In Gloucester Ferry Co. vs. Pennsylvania, supra, Mr. Justice Field, who delivered the opinion of the court, in speaking of ferries 'over waters separating' the states, concedes 'that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and * * * convenience of the public. (114 U. S. 217, 5 Sup. Ct. Rep. 835.) If the establishment of a ferry over a river separating two states is not an interference with interstate commerce, the establishment of one over the boundary between between the state and a foreign country is not an interference with foreign commerce, and it follows that the establishment of such ferries is a matter within the jurisdiction of the states, respectively, and not of the congress of the United States. We conclude that the decision in Conway vs. Taylor is not overruled, either expressly or by implication, and that it is decisive of the question in support of which it was cited. The motion for a new hearing is overruled."

And as the *Wiggins case* affirmed the same doctrine as *Conway vs. Taylor,* the ruling of the court in the *Tugwell* case applies with equal force to the *Wiggins case.* The *Wiggins case* was also cited with approval in the case of *Postal Telegraph Co.* vs. *City Council of Charlestown,* 153 U. S. 692, 38 L. ed. 871, on this very point. There is

no good reason for claiming that the *Wiggins case* has been overruled.

In *Old Dominion Steamship Co. vs. Virginia*, 198 *U. S.* 299, 306; 49 L. ed. 1062, decided in 1905, opinion by Mr. Justice Brewer, the question was on the right of the state to tax property used in interstate commerce, and the Court distinguishing between what was and what was not a burden on commerce quoted from the *Gloucester* case, reiterating:

> "Freedom from such impositions does not, of course, imply exemption from reasonable charges as compensation for the carriage of persons in the way of *tolls* or *fares.*"

Covington Bridge Case, Decided 1894.

In regard to the case of *Covington Bridge Co.* vs. *Kentucky,* 154 U. S. 204, while purely a *bridge* case, there are expressions in the opinion that tend to support defendants contention as to its application to ferries. The court in determining the question of the right to fix tolls on a bridge crossing the Ohio river, discussed matters at considerable length for illustration, and in doing so referred to the regulation of ferries. The nucleus, however, upon which the decision seems to have turned, according to the majority opinion, was that Kentucky sought to regulate the fares and tolls not only from the Kentucky shore across to Ohio, but from Ohio back to Kentucky. The Court, in referring to the case of Conway vs. Taylor, said:

> "It is true the states have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon inter-

state ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states. But we are not aware of any case in this court where such right has been recognized. Of recent years it has been the custom to obtain the consent of Congress for the construction of bridges over navigable waters, and by the seventh section of the Act of September 19, 1890 (26 Stat. 426, 454), it is made unlawful to begin the construction of any bridge on navigable waters until the location and plan of such bridge have been approved by the Secretary of War, who has also been in frequent instances authorized to regulate the tolls upon such bridges."

The court evidently had in mind the bridge and not particularly a ferry, because in *Fanning* vs. *Gregoire*, a ferry case decided by this Court in 1853, the power of the State of Iowa to establish ferries across the Missiissippi river and to *fix the rates* of the same, was assailed as being in violation of the commercial power of congress and of the ordinance of 1787. And this court held that:

"neither of these interfere with the police power of the states in granting ferry licenses."

And it will be borne in mind that in the Covington case, Kentucky sought to regulate not only from its own shores but from the shores of Ohio as well. In the case at bar the ordinance does not attempt to dictate to Canada as to what regulations it may make in its sovereign power. The cases are for this reason clearly distinguishable.

In *United States* vs. *New Bed. Bridge* Fed Cases, No. 15867, the court held:

"States may regulate *ferry rates,* inspection,

> etc., without violating the grant over commerce to Congress, though in some degree affecting commerce, if it does not come in direct conflict with legislation by Congress."

This court in the Covington Bridge case, referring to the Wiggins Ferry case, said:

> "Obviously the case does not touch the question here involved."

The *Wiggins* case was a *ferry* case and not a *bridge* case. It squarely decided that the states had the right to *regulate ferries* across boundary streams. The majority of the court in the *Covington Bridge* case expressly declared that the *question involved* in the *Wiggins* case was not involved in the *Covington* case. Thus the *Wiggins* case has not been overruled by the *Covington Bridge* case, but sanctioned as to the regulation of *ferries* by the state.

But in the *Covington Bridge* case the court placed the regulation of ferries in the class of powers reserved to the states until congress should act, citing *Conway* vs. *Taylor*, 1 Black, 603.

And further referring to ferries and the decision in the case of *Munn* vs. *Ill.*, 94 U. S. 113, the court said:

> "From time immemorial in England, and in this country from its first colonization, it had been customary to regulate *ferries*, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodaitons furnished, and articles sold. That the decision does not necessarily imply a power in the states to prescribe similar regulations with regard to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of

the chief justice (page 135) in delivering the opinion of the court."

The Court in the *Covington Bridge* case further said:

> "The authority of the state, so frequently recognized by this court to fix tolls for use of wharves, piers, etc., * * * cannot be extended to *structures* connecting two states without involving a liability of controversies of a serious nature."

It will be noticed that the court had in mind *"structures,"* not ferries, and even upon the question presented in the Covington case regarding a *bridge,* Chief Justice Fuller and Justices Field, Gray and White dissented on the question of the right of the State to regulate the tolls on the bridge, but concurred on the ground that the statute impaired the obligation of contract.

In the *Postal Telegraph Cable Co.* vs. *Charlestown City Council,* 153 U. S. 691, decided about the time of the Covington Bridge case, the *Wiggins Ferry Co.* case was cited with approval upon state regulation by six of the nine judges.

In the case of Henderson Bridge Co. vs. Kentucky, 166 U. S. 159, decided in , the question was on the right of the state to tax the franchise of the bridge company on a bridge connecting two states, and the court by a majority opinion held:

> "That a bridge which is situated in two states, with the sanction of the laws of both, which has been made a post route by Act of Congress, is not an instrument of interstate commerce."

In the dissenting opinion, Mr. Justice White said:

> "Where, may I ask, can the line of distinction be drawn between the *Covington Bridge* case and this? * * * Where also, I submit, does a distinction exist between this case and the case of the

ferry between Pennsylvania and New Jersey, considered in the *Gloucester Ferry* case, or the attempt of the State of Illinois to regulate freight charges between the state and New York, embraced in the *Wabash* case. Manifestly, there is an irreconcilable conflict between the decision in this case and the ruling of the Court in the cases just cited. It follows that in order to maintain the tax in the case at bar the *decisions referred to must be and are as I conceive substantially overruled by the opinion now announced.*"

Bridge Cases.

Whether the *Covington Bridge* case has been overruled as stated by Mr. Justice White by the decision in the *Henderson Bridge* case or not, does not, in our judgment, control this case. That was a bridge case. Bridges, owing to the fact that they obstruct navigation, long since became a subject for regulation by Congress. For a time States continued to exercise the power of erecting bridges until Congress acted.

In *Transportation Company* vs. *Parkersburg*, 107 U. S. 691; 27 L. ed. 589, the court said:

> "In the various bridge cases that have come before the courts of the United States where bridges, or dams, have been erected by State authority across navigable streams, the refusal to interfere with their erection has always been based upon the absence of prohibitory legislation by Congress and the power of the States over the subject in the absence of such legislation."

But long ago Congress began legislating in regard to

bridges and navigation. We mention a few of the many acts of Congress on bridges.

By act of Congress, February 20, 1811, the Mississippi and tributaries were declared common highways and forever free. In 1868 permission was given by Congress to build bridges over the Iowa river. By Act of Congress, March 3, 1869, authority was granted to build the Brooklyn bridge. In 1865, Congress took action on the bridge over the Ohio river mentioned in the *Covington Bridge* case, and declared it a lawful structure and post road. Over the Mississippi, by Act of Congress, July 26, 1866, and finally by general acts of Congress of September 26, 1890, and March 3, 1899.

In the *Covington Bridge* case the court said:

> "Of recent years it has been the custom to obtain the consent of Congress for the construction of bridges over navigable waters."

In Fanning vs. Gregoire, this court said:

> "When navigable rivers, within the commercial power of the Union, may be *obstructed*, one or both of these powers of Congress may be invoked."

Yet we do not find a single instance where Congress passed an Act relative to the establishment of ferries. Free navigation permits *ferries*, but prohibits *obstructions*, and bridges are very likely to be obstructions.

That this Court does not understand the Covington Bridge case to overrule the previous ferry cases, appears from two subsequent decisions: *Williams* vs. *Wingo*, 177 U. S. 601; and *Louisville Ferry Co.* vs. *Kentucky*, 188 U. S. 385; the first of these cases decided six years and the second ten years later than the Covington Bridge case.

In *Williams vs. Wingo* this Court, after stating the substance of *Fanning vs. Gregoire*, including the fact that

the stream there dealt with formed a State boundary, held that that case was "in point and decisive" (177 U. S. at p. 603) of a similar question arising upon an intra-State stream.

In *Louisville Ferry Co. vs. Kentucky* this Court (188 U. S. at p. 394) cited and approved the case of *Conway vs. Taylor's Executor.*

It is our contention, therefore, that the Covington Bridge case has not overruled the former ferry cases, on the right of the States to regulate *ferries* on boundary streams.

However, if the power to regulate ferries over boundary streams should be held to remain in the States only until Congressional action thereon, we still insist that there is no act of Congress, so far as we have been able to find, that is intended to deprive the States of this power; and, therefore, even under this view of the case, the power still remains in the State of Michigan, and the ordinance in the case at bar is valid.

There is no federal statute which supersedes the States' jurisdiction to regulate ferries.

If the power reserved to the states to regulate *ferries* over boundary streams is divisible into those that are exclusive in the state, and those that are subject to state regulation until the state is divested of the power by congressional legislation, and if the case at bar falls within the latter class, then it becomes a question whether the power of the state to regulate ferries has been divested by Congress.

Assuming for the purpose of the argument on this proposition that in nearly all of the judicial decisions of

the highest courts in the land, from the adoption of the Constitution down, the courts in holding that the power to regulate *ferries* was reserved to the states, did not mean to say that this reserved power was not divisible into those that are exclusive in the states, and those that are permissive only until Congress should act; and that the question of whether the regulation of *ferries* in certain cases, and particularly over boundary streams while reserved to the states, was still open to consideration as to whether the power reserved was exclusive in the states or merely reserved until divested by congressional acts; we contend that there is no congressional act that deprives the State of Michigan from regulating ferries on the St. Marys River, and consequently the ordinance in question is not invalid.

We say, assuming that the power to regulate *ferries* in certain cases was merely reserved to the states until Congress has acted, because in Gloucester Ferry Co. vs. Commonwealth of Pa., 114 U. S., 196, (29 L. ed. 158, at page 166) this court, although without any explanation of the language of the court used in the prior ferry cases, said:

> "Ferries between one of the states and a foreign country cannot be deemed, therefore, beyond the control of Congress under the commercial power."

In the ferry case of N. Y. C. & H. R. Ry. Co. vs. oBard of Chosen Freeholders of the County of Hudson, 33 Sup. Ct. Rep. 269, owing to the concessions of the parties as to the issue, the question upon which the case turned was as to whether congress had acted, and it was held that the ferry in that case came within the Act of Congress of February 4, 1887, as a railroad ferry.

Ordinary Ferry.

The ferry in controversy in the case at bar is purely a technical ferry. An ordinary ferry was in St. Clair County vs. Interstate S. & C. Transfer Co., 192 U. S. 454, 48 L ed. 518, held to be

> "A ferry for the transportation across the river of persons, animals and freight, at intervals, more or less regular for fare or toll."

The ferry in the case at bar *is* no such ferry as the ferry under consideration in the St. Clair County case. In that case the ferry was not an ordinary ferry, but one designed for shipping cars, while the ferry in the case at bar is an ordinary ferry for persons, animals and freight. It is not a railroad ferry.

The federal statutes in regard to enrollment, inspection and license of vessels are not involved.

ACTS OF CONGRESS RELATIVE TO THE LICENSING AND ENROLMENT OF VESSELS DO NOT INTERFERE WITH FERRIAGE.

In *Conway vs. Taylor's Executor*, 1 Black, 603, it was shown that the vessels enjoined were enrolled and licensed under the laws of the United States. They were entitled, therefore, the Court said, to "The prosecution of the carrying and coasting trade, and of ordinary commercial navigation," but it was added this gives no authority to "invade the ferry franchise of another, without authority from the holder." A similar decision was rendered in *Carroll vs. Campbell*, 108 Mo., 550, where the Court said:

"Let it be admitted then, that the defendants are engaged in the carrying trade on the Mississippi River, and their vessel duly officered and licensed; does this give them the right of ferry which they claim, and which they admit they exercised? We think not. The question mooted in this case it not new. It has been met and decided by the Supreme Court of the United States time and again; and it is with great satisfaction that one reads the opinion of that court, and observes with what clearness the jurisdiction of the States and federal government are confined."

"In the case of *Conway vs. Taylors Executor,* the question raised by respondents was examined by Mr. Justice Swayne. It was urged in that case, just as in this, that the Commodore having been enrolled under the laws of the United States, the injunction violated the rights which the enrollment and license gave her in respect to trade, by obstructing the free navigation of the Ohio. The Court held that the decree only enjoined the Commodore from interfering with the ferry privileges;; that it was not intended to exclude or restrain defendants from prosecuting the ordinary business of commerce." (pp. 562-563.)

A long line of authorities hold that the Federal statutes referred to are not involved.

Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, affirming 102 Ill., 560.

The Nassau, 182 Fed., 696, affirming in part 110 C. C. A., 184.

People vs. Babcock, 11 Wend., 586; opinion by Judge Samuel Nelson.

Mayor vs. Starin, 106 N. Y., 1.

Mayor, etc., vs. Longstreet, 64 How., Pr. 30.
Midland, etc., Ferry Co. vs. Wilson, 28 N. J., Eq. 537.
Carroll vs. Campbell, 108 Mo., 550, 562-3.
Marshall vs. Grimes, 41 Miss., 27.
Chilvers vs. People, 11 Mich., 43.

These statutes have been in existence many years, and during all this time State ferry rates throughout the country have been regulated by State law. No suggestion can be found in the decision of any court that this practice contravenes these statutes.

In *Missouri P. R. Co. vs. Larabee Flour Mills*, 211 U. S., 612 (622), 53 L. ed. 361, decided in 1909, opinion by Mr. Justice Brewer, the claim was made that in establishing an Interstate Commerce commission Congress has acted, but the Court said:

> "Congress could always regulate interstate commerce and could make specific provisions in reference thereto, and yet that has not been held to interfere with the power of the states in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect and does not of itself disturb the authority of the state."

Congress recognized the power to regulate ferries as reserved to the States.

The States of Maryland and Virginia were divided by the River Potomac. The legislature of the State of Virginia had vested in the county courts of that state power to establish and regulate ferries. The legislature of the State of Maryland had vested in the county and levy

courts of that state the power to establish and regulate ferries. Portions of each state were ceded to the United States as the District of Columbia, and the same was accepted by Congress in the year 1790. In 1800 Congress removed to the District. And in 1801 Congress by legislative enactment divided the Disitrict into two counties. That portion on the east side of the river was designated Washington County, while that on the west side of the river named Alexandria County. At the time these counties were formed Congress recognized the right of the states to regulate ferries, and desiring to regulate ferries in the District of Columbia, along the same line that ferries were regulated in those states, provided by Act of Congress of March 3, 1801 (2 Stat. 115) as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the circuits courts for the District of Columbia shall be and they are hereby invested with the same *power respecting* * * * * * ferries for the County of Alexandria, as have heretofore been vested in the county courts of the commonwealth of Virginia; and for the county of Washington, the same power and authority as have been heretofore exercised by the county and levy courts of the State of Maryland."

Here is an Act of Congress in which the right of the states to regulate ferries is fully recognized; not only that but Congress legislating for the district of Columbia adopts similar laws for the district.

In re Young Fed. Cases No. 18150.

(2 Cranch, C. C. 453.)

The power of the state to regulate ferries on boundary streams between the states and a foreign country is the same as over streams dividing states.

In 1834, in People vs. Babcock, 11 Wend., 587, it was held that the State of New York had the power to regulate ferries from the New York shore over the *Niagara river* between the State of New York and Canada.

In 1862 the Supreme Court of the State of Michigan in Chilvers vs. People, 11 Mich., 43, held that the State of Michigan had the power to regulate ferries from the Michigan shore on the Detroit river between Michigan and Canada.

In 1888 the Supreme Court of Texas, in *Tugwell vs. Eagle Pass Ferry Co.*, 9 S. W., 122, held that the State of Texas had power to regulate ferries from the Texas shore on the Rio Grande between Texas and Mexico, which decision was on rehearing affirmed, 13 S. W., 654.

In Gloucester Ferry Co. vs. Commonwealth of Pa., 114 U. S., 196, the court (at page 166 of 29 L. ed.) said:

> "If they (ferries between one of the States and a foreign country) are not beyond the control of the commercial power of congress, neither are ferries over waters separating states."

Here this court regarded ferries over national boundary streams, and those on streams dividing states, to fall within the same rule as to regulations.

Some Articles of Freight Carried.

Testimony was offered by the defendant in error to show that on some occasions some articles of freight were

carried on the ferry boats unaccompanied by the owner or custodian. But it was conceded that the receipts for same only amounted to about one-fifteen hundredth part of the receipts received for passengers, and for freight in care of the owner or custodian. (Transcript of Record p. 36.)

The amount of freight carried unaccompanied by the owner or custodian is so small compared with the amount of business in carrying passengers and parcels of freight in the custody of the owner, or custodian, that it is insignificant and would not change the character of the ferry business into a freighting business, or change the rules of law applicable to the regulation of ferries. But aside from this the business of an ordinary ferry includes carrying *freight.*

> St. Clair County vs. Interstate S. & C. Transfer Co., 192 U. S., 454.

Congress, referring to ferries under the revenue laws, designates them as

> "Vessels used exclusively as ferry boats carrying *passengers, baggage* and *merchandise.*"
>
> Sec. 2792, U. S. Revised St., 1878.

A License Fee is Not a Tax on Commerce.

In *Wiggins Ferry Co. vs. East St. Louis,* 107 U. S., 365, this court held:

> "It is next insisted by plaintiff in error that the license fee exacted by the ordinance of the City of East St. Louis is a tonnage tax, which the States are forbidden to lay without the consent of Congress. This contention has no ground to rest on. In the first place, the license fee is levied, not on the ferry boat, but on the ferry keeper."

To the same effect in Chilvers vs. The People, 11 Mich., 42, 49. See also:

Ash vs. The People, 11 Mich., 347.
Kitson vs. Mayor, etc., 26 Mich., 324.
McQuillin Mun. Ord., Sec. 409.

FIXING RATES.

The power of the state to license and regulate ferries includes the power to fix rates.

In *Fanning vs. Gregoire*, 16 How., 524; 57 U. S. 14, L. ed. 1043, 1046, the City of Dubuque was empowered:

> "To license and establish ferries across the Mississippi River from the City of Dubuque to the opposite shore and to *fix the rates.*"

The power of the State to establish and regulate ferries was assailed as an interference with the commercial power of Congress, but this court sustained the power of the state.

In *Wiggins Ferry Co. vs. East St. Louis*, 102 Ill., 560, the City of East St. Louis by ordinance provided for the license, tax and regulation of ferries. The power of the state to regulate was upheld in this court. 107 U. S., 365.

In *United States vs. New Bed. Bridge Co.*, Fed. Cases No. 15867 (1 Woodb. & M., 401), it was held:

> "States may regulate ferry rates, inspection, etc., without violating the grant over commerce to Congress, though in some degree affecting commerce, if it does not come in direct conflict with legislation by Congress."

See also

People vs. City of New York, 32 Barb., 102.
Parker vs. Metropolitan R. C., 109 Mass., 506.

Boston Ferry Co. vs. City of Boston, 101 Mass., 488.

State vs. Sickman, 65 Mo. App., 499.

State vs. Freeholders of Hudson Co., 23 N. L. Law (3 Zab.), 206.

Freeholders of Hudson County vs. State, 24 N. J. Law (4 Zab.), 718.

Stephens vs. Powell, 1 Or., 283.

State vs. Faudre, 54 W. Va., 122.

FOREIGN CORPORATION.

The defendant in error contended in the trial court that as it was a foreign corporation it was entitled to the application of a different rule than if it were a domestic corporation. We contend that there is no authority for such a doctrine. The well recognized rule applies with equal force to both domestic and foreign corporations.

In the *Port Richmond* x *Bergen Point Ferry* case, supra, the ferry company was a New York corporation, but the right of the State of New Jersey to fix the rates from its shores to New York was affirmed. The Court said:

> "Whether the proprietor of the ferry, if a natural person, be a citizen of New Jersey or New York, or, if a corporation, be *chartered by our State or another state* is immaterial. The *rates* authorized by the New York charter to be collected by the corporation in question are no doubt controlling, as to its fares collected *in that state*.. But, when that New York corporation comes over to New Jersey and sets up a *ferry terminus here*, it necessarily does so object to our laws and cannot import a New York statute to justify the collection here of *charges that our laws forbid*. It is the *maintenance*

of a ferry terminus within this state and not the place of birth or of the residence of the proprietor of the ferry that gives the jurisdiction to fix the rates to be collected within this State."

Treaty Not Violated.

It is claimed by counsel for defendant that the ordinance of the city violates the Treaty between Great Britain and the United States. The Treaty provides:

ARTICLE I.

"The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purpose of commerce to the inhabitants and to the ships, vessels and boats of both countries equally; subject, however, to any laws and regulations of either country, *within its own territory*, not inconsistent with such privileges of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries."

(Transcript of Record 73-4.)

The language—

"continue free and open for the purpose of commerce to the inhabitants and to the ships, vessels and boats of both countries"

is much the same as the language contained in the Ordinance of 1787, where it provides that the Mississippi River

"shall be a *common highway* and *forever free*, as well to the inhabitants of said territory as to the citizens of the United States."

And it has been held by the State courts and by this court that the regulation of ferries by the states did not violate these provisions of the ordinance.

In Fanning vs. Gregoire the court said:

> "The argument that the free navigation of the Mississippi River, guaranteed by the Ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with the police power of the States, in granting ferry licenses."

In *Conway vs. Taylor*, the decision of the court in Fanning vs. Gregoire on this point was quoted and approved.

In *Escanaba, etc., Trans. Co. vs. Chicago*, 107 U. S., 678, 27 . ed. at p. 447, the court, dealing with the same subject, said:

> "In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise as the necessities and convenience of the community may require."

In *Mills vs. St. Clair County*, 7 Ill. (2 Gilman), 197, relative to ferries on the Mississippi River, the court held:

> "Such ferries do not conflict with the provisions of any *treaty* made by the United States with any foreign power, or with any act of Congress relative to the free navigation of the waters on which such ferries are operating."
>
> Affirmed in 49 U. S., (8 How., 569.)

In *N. Y. C. and H. R. R. Co. vs. Freeholders*, (N. J.) 74 Atl., 961, that court, referring to a treaty between the State of New York and New Jersey, said:

> "It is pointed out in the opinion of the Supreme

Court (N. J.) that the treaty between New York and New Jersey granted to the State of New York exclusive jurisdiction over the waters between the terminal points of these ferries, and so excludes any exertion of power by New Jersey in regulating, in any way, vessels moving upon those waters. It would seem, however, that whether the jurisdiction of the State of New York runs to the middle of the Hudson river or to the New Jersey shore, it would not effect the question now involved. The *ferry house is within the jurisdiction of New Jersey, and it is the right of the State to regulate the charges which the keeper may impose for transportation to New York that is involved.*"

See also Conway vs. Taylor, supre.

Vallejo Ferry Co. vs. Lang and McPherson, (Cal.), 120 Pa., 421.

We submit, therefore, that the treaty is not violated by the provisions of the Ordinance.

It is also provided by defendant's ferry franchise that:

"The said license shall not at any time during the existence of the license, willfully and knowingly infringe any of the laws or by-laws or of the regulations of the United States of America, or of the State of Michigan, or of the town of Sault Ste. Marie, U. S. A., in reference to ferriage which may be applicable to the said Ferry or such portion thereof as may be within the jurisdiction of any of them, United States of America, State of Michigan and the town of Sault Ste. Marie, or permit or suffer the same to be infringed by any officer, servant or employe of the said Licensee."

(Tran. of Record p. 67-8.)

THE INCONSISTENCY OF APPELLEE'S POSITION.

The strange anomaly of Appellee's position is that while it says to the State of Michigan we have the right to come to your shore and, without permission either from you or from the United States set up and maintain a ferry from your shore, because Canada has given us an *exclusive* franchise to ferry on the St. Marys River, while any attempt on your part to do the same thing is in violation of the Constitution of the United States, and also in violation of the Treaty; our engaging in the ferry business from your shore does not violate the Treaty, but if you attempt it you violate it. We can, under the cover of your Federal Constitution, come to your shore and there establish a ferry, without consent, but you must not establish a ferry there because your Federal Constitution forbids you to do it.

In other words, our Federal Constitution is used as a weapon against us; but, on the other hand, it is used as a shield and protection for foreigners to come to our shore and engage in the business of ferriage.

We do not believe that the Court would sanction the proposition that either the *treaty*, or our *Federal Constitution*, can be used for that purpose.

If our Federal Constitution gives to Congress the power to regulate ordinary ferries whenever Congress assumes control thereof by legislative action, we do not believe Congress would be eager to take over the regulation of ferries on our boundary streams. There might be certain specific instances where Congress would undertake to regulate, or a certain specified character of ferriage over which it would assume control. But to assume regulation of ferries over thousands of miles of boundary

streams, ranging from fifty feet to a mile in width, and possibly with thousands and thousands of ferriage places, operated with all conceivable kind of crafts and all requiring local and perhaps different regulation, would be an undertaking so stupendous that we might justly say that Congress would hesitate before assuming such an undertaking.

And yet ferries must be regulated. If not regulated, travelers have no protection from the zealous solicitations of unscrupulous ferrymen, who prey upon the necessities of the unwary traveler, and there would be no protection to the lives of travelers from the use of unseaworthy crafts, or crafts manned by irresponsible ferrymen. The loss of life is not an uncommon occurrence occasioned by use of such crafts and manned by such persons.

In fact, one of the moving causes for the present ordinance was the result of such a catastrophe on the St. Marys River in which several lives were lost. On the shore of the river within the city of Sault Ste. Marie there are opportunities for numerous ferries. Ferrymen, of all character, along the shore, in their solicitations for patronage, venture to the streets of the city. The charge in many cases are whatever they can induce travelers to pay. It is necessary for the protection of the public that there be some local regulation of ferries to insure safety and protection to travelers. Regulation of ferries on the St. Marys River, from the Michigan side, can be done best by regulation of the municipality.

This court in the case of *Mills vs. The County of St.* Clair, in 49 U. S., 12; L. ed. at p. 1208, referring to local matters, said:

> "It would follow, that all State laws, special and general, under whose sanction roads, *ferries* and bridges are established, would be subject to our

supervision. A new source of jurisdiction would be opened, of endless variety and extent, as, on this assumption, all such cases could be brought here for final adjudication and settlement; of necessity, we would be called on to adjudge of fairness and abuse to ascertain whether jurisdiction existed, and this to decide the law and facts; in short, to do that which State courts are constantly doing, in an exercise of jurisdiction over peculiarly local matters; by which means a vast mass of municipal powers, heretofore supposed to belong exclusively to State cognizance, would be taken from the States, and exercised by the general government, through the instrumentality of this court. That such a doctrine cannot be maintained here has in effect been decided in previous cases."

We submit that the regulation of ferries over boundary streams is reserved to the States, and that such regulation is not in violation of the commerce clause of the Constitution, nor of the treaty between the United States and Great Britain; that if the powers so reserved remains only until Congress shall act, then the power is still in the State, as Congress has not acted, and the ordinance is valid.

We submit that the learned trial court was in error in its decision, and the case should be reversed.

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